

Application No. 08/480,641
Amendment dated October 5, 2005
Reply to Office Action of April 6, 2005

REMARKS

Applicant amended claim 236 and added new claim 241 to further define Applicant's claimed invention.

Applicant respectfully brings to the Examiner's attention that two Form PTO 1449's submitted with the Information Disclosure Statements dated July 26, 2001 and August 6, 2004 signed by the Examiner have yet to be received by Applicant. It is respectfully requested that the Examiner provide copies of the signed Form 1449's to the Applicant with the next action by the Examiner.

In the Office Action, the Examiner objected to claims 104, 105, 107, 122, 123, 128, 133, 134, 141-180, 186, 187, 194, 195, 200, 204, 208, 214, 215, 222, 223, and 235 as being dependent upon a rejected base claim, but being allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. The Examiner allowed claims 114, 115, 138, and 237-240. Applicant respectfully submits that claims 141-180 depend from allowed independent claim 114 and therefore are also allowed at least due to their dependency from an allowed claim, or claims dependent therefrom.

The Examiner rejected claims 95-97, 99-103, and 106 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,545,374 to Jacobson ("Jacobson"). Applicant respectfully traverses the Examiner's rejection. Independent claims 95 and 102 each recite a spinal distractor with at least one disc penetrating extension "having a portion adapted to bear against each of the adjacent endplates of the two adjacent vertebral bodies" and a length that is "greater than the depth of the spinal disc intermediate the two adjacent vertebral bodies" between which the disc penetrating extension is adapted to be inserted.

Jacobson does not teach a spinal distractor. Jacobson teaches a cannula 30 having slidable anchor wires 33 to "pierce the disc capsule and prevent shearing movement between the disc and cannula." (Jacobson, col. 9, lines 41-45; Figs. 13, 13A). Each of the anchor wires 33 do not have a portion adapted to bear against each of the endplates of the adjacent vertebral bodies as recited in independent claims 95

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and 102. Moreover, Jacobson does not teach anchor wires 33 having a length extending from the body of the cannula that is greater than the depth of the spinal disc intermediate the adjacent vertebral bodies as recited in claims 95 and 102. (See, e.g., Jacobson, Fig. 6). Accordingly, Applicant respectfully submits that the Examiner's rejection under 35 U.S.C. § 102(b) in view of Jacobson has been overcome.

The Examiner rejected claims 95-101, 108-113, 116-121, 124-127, 129-132, 135, 136, 139, 181-185, 188-193, 196-199, 201-203, 205, 206, 209-213, 216-221, 224-233, and 236 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,878,915 to Brantigan ("Brantigan"). Applicant respectfully traverses the Examiner's rejection. Independent claim 95 recites a spinal distractor with at least one disc penetrating extension "having a portion adapted to bear against each of the adjacent endplates of the two adjacent vertebral bodies" and a length that is "greater than the depth of the spinal disc intermediate the two adjacent vertebral bodies between which said disc penetrating extension is adapted to be inserted." Independent claims 108 and 131 each recite an apparatus including a guard member and at least one disc penetrating extension "having a portion adapted to bear against each of the adjacent endplates of the adjacent vertebral bodies" and a length that is "greater than the depth of the disc space."

Brantigan discloses instrumentation for preparing an installation space from the posterior to anterior aspects of the vertebrae. In particular, Brantigan discloses a drill guard 22 with teeth or prongs 23 penetrating and anchored in the posterior side of both vertebrae. (Brantigan, col. 5, lines 41-45). Teeth or prongs 23 do not have a portion adapted to bear against each of the endplates of the adjacent vertebral bodies as recited in independent claims 95, 108, and 131. (See, e.g., Brantigan, Fig. 4). Moreover, teeth or prongs 23 do not have a length that is greater than the depth of the spinal disc intermediate the adjacent vertebral bodies as recited in claim 95, or a length that is greater than the depth of the disc space as recited in claims 108 and 131. (See, e.g., Brantigan, Fig. 4).

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For independent claim 131 in particular, this claim further recites the guard member including a hollow tube "having a detachable distal end portion." The drill guard of Brantigan does not have a detachable distal end portion. (See Brantigan, Fig. 4). On three previous occasions, the Examiner indicated that the subject matter of claim 131 was allowable over the disclosure of Brantigan. (See Office Actions dated September 2, 1999; January 26, 2001; and September 18, 2001). In the present Office Action, the Examiner has not provided Applicant with any explanation as to why the allowability of claim 131 was withdrawn. Applicant respectfully requests the Examiner to provide a basis for the rejection of claim 131 over Brantigan or allow claim 131 in the next action.

Applicant respectfully submits that the Examiner's rejection of claims 95-101, 108-113, 116-121, 124-127, 129-132, 135, 136, 139, 181-185, 188-193, 196-199, 201-203, 205, 206, 209-213, 216-221, 224-233, and 236 under 35 U.S.C. § 102(b) as being anticipated by Brantigan has been overcome.

The Examiner rejected claims 137, 207, and 234 under 35 U.S.C. § 103(a) as being unpatentable over Brantigan '915 in view of Goble. Applicant submits that the rejections over claims 137, 207, and 234 are rendered moot at least because they depend from an allowable independent claim, or claims dependent therefrom.

Applicant submits that independent claims 90, 95, 102, 108, 114, 115, 131, 138, 139, 140, and 237 are patentable and that dependent claims 96-101, 103-107, 109-113, 116-130, 132-137, 141-236, and 238-240 dependent from independent claims 90, 95, 102, 108, 114, 115, 131, 138, 139, 140, or 237, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

In view of the foregoing remarks, it is respectfully submitted that the claims, as amended, are patentable. Therefore, it is requested that the Examiner reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any

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fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-1068.

Respectfully submitted,

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